Supreme Court, U.S.
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No. 02-1035

IN THE

United States Supreme Court

DAVID PEARL,

Petitioner,

vs.

THE CITY OF LONG BEACH, LONG BEACH CITY POLICY DEPARTMENT, LONG BEACH POLICE OFFICER LEO NOLAN, LONG BEACH POLICE OFFICER ARTHUR WHITMAN, LONG BEACH POLICE OFFICER VINCENT MILO,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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61 pp

QUESTIONS PRESENTED

A conspiracy, designed to prevent the victim of excessive force by the police from effectively pursuing his remedies under 42 U.S.C. § 1983, succeeded in so doing for thirty two years, until one of the police officer conspirators confessed its existence.

The lower courts held that the Petitioner's claims for violations of his rights under the Fourth, Fifth, Eighth and Fourteenth Amendments pursuant to 42 U.S.C. § 1983 were not timely based upon the applicable period of limitations. The questions presented here are:

1. Is the determination of whether such an action is barred by the statute of limitations resolved by whether the victim was "deprived of a fair opportunity to seek redress by virtue of defendants' fraudulent concealment of facts crucial to a fair disposition of the dispute" as the Seventh Circuit has ruled or, rather, by whether the victim "had reason to believe" that the conspirators were lying, as the Second Circuit has ruled in this case?

2. In a case brought for denial of access to the courts, does this Court's opinion in *Christopher v. Harbury*, 536 U.S. 403, 122 S.Ct. 2179, 153 L.Ed. 2D 413 (2002), preclude the assertion of the statute of limitations running from the time of the underlying constitutional violation, where the original claim resulted in a palpably "inadequate settlement of a meritorious case . . . due to missing or fabricated evidence" and orchestrated by a conspiracy of public officials?

PARTIES TO THE PROCEEDING

The following party was the Plaintiff below and is the Petitioner before this Court: David Pearl.

The following parties were the Defendants below and are the Respondents before this Court: The City of Long Beach, Long Beach City Police Department, Long Beach Police Officer Leo Nolan, Long Beach Police Officer Arthur Whitman, and Long Beach Police Officer Vincent Milo.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iv
PETITION FOR WRIT OF CERTIORARI	1
OPINIONS BELOW	1
JURISDICTION	2
STATUTES INVOLVED IN THE CASE	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	9
I. THE PETITION SHOULD BE GRANTED BECAUSE THE DECISIONS OF THE COURTS BELOW CONFLICTS WITH THE DECISION OF THE SEVENTH CIR CUIT IN *BELL V. CITY OF MILWAUKEE*, 746 F.2nd 1205 (7th Cir. 1984)	9
II. THE PETITION SHOULD BE GRANTED BECAUSE THE DECISIONS OF THE COURTS BELOW CONFLICT WITH THIS COURT'S DECISION IN *CHRISTOPHER V. HARBURY*, 536 U.S. 403 (2002)	15
CONCLUSION	18

TABLE OF AUTHORITIES

Page

Federal Cases

Bell v. City of Milwaukee, 746 F.2d 1205 (7th Cir. 1984)..... 8, 9, 12, 15, 16, 17

Christopher v. Harbury, 536 U.S. 403, 122 S. Ct. 2179 (2002)..... 1, 15, 16

City of Canton v. Harris, 489 U.S. 378 (1989)..... 11

Conley v. Gibson, 355 U.S. 41 (1957) 12

Foster v. Lake Jackson, 28 F.3d 425 (C.A.5 1994) 16

Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 507 U.S. 163 (1993)..... 11

Marbury v. Madison, 5 U.S. 137, 1 Cranch 137 (1803)..... 17

McNabola v. Chicago Transit Authority, 10 F.3d 501 (7th Cir. 1993)..... 11

Monell v. Department of Social Services, 436 U.S. 658 (1978)..... 11

Paige v. Police Department of Schenectady, 264 F.3d 197 (2nd Cir. 2001) 13

Pearl v. City of Long Beach, 296 F.3d 76 (2nd Cir. 2002) 1

Spell v. McDaniel, 824 F.2d 1380 (4th Cir. 1987)..... 11

Page

Swekel v. River Rouge, 119 F.3d 1259 (C.A.6 1997) 16

Vasquez v. Hernandez, 60 F.3d 325 (7th Cir 1995) 13, 14

Federal Statutes

28 U.S.C. § 1254 2

42 U.S.C. § 1983 ..... 2, 6, 8, 13

F.R.C.P. 12(b)(6) 14

18 U.S.C. § 1961 *et seq.* 6, 9

N.Y.Criminal Penal Law § 215.70 10

N.Y.Criminal Procedure Law § 190.25(3)..... 10

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on July 15, 2002, in order to resolve a conflict between the Second Circuit Court of Appeals, on the one hand, and the Seventh Circuit Court of Appeals and because the judgment and opinion of the Second Circuit in this case conflicts with the decision of this Court in *Christopher v. Harbury*, 536 U.S. 403, 122 S.Ct. 2179, 153 L.Ed.2d 413 (2002) on the important issues presented herein.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit that gives rise to this petition is reported at *Pearl v. City of Long Beach*, 296 F.3d 76 (2nd Cir. 2002). It is reprinted in Appendix A hereto ("App. A") at page 5a. The mandate of the United States Court of Appeals for the Second Circuit, filed on July 15, 2002, is reprinted at 32a. The Order of the United States Court of Appeals for the Second Circuit denying Petitioner's Petition for Rehearing *En Banc*, filed on October 9, 2002, is reprinted at 34a.

The Order of the United States District Court for the Eastern District of New York, entered on July 10, 2001, is unreported and is reprinted at 1a. The judgment of the United States District Court for the Eastern District of New York, filed on July 18, 2001, is unreported and is reprinted at 3a.

JURISDICTION

On July 10, 2001, the United States District Court for the Eastern District of New York, by the Honorable Leonard D. Wexler, granted the motion of Respondents The City of Long Beach, the Long Beach City Police Department, Long Beach Police Officer Leo Nolan, Long Beach Police Officer Arthur Whitman and Long Beach Police Officer Vincent Milo (hereinafter referred to as the "Respondents"), pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure to dismiss the complaint. Review was sought in the United States Court of Appeals for the Second Circuit.

On July 15, 2002, the Second Circuit denied Petitioners' appeal in all respects. A timely Petition for Rehearing *En Banc* was filed by the Petitioner. That Petition was denied on October 9, 2002. Pursuant to Supreme Court Rule 13.1, this petition has been filed within 90 days of the denial of the Petition for Rehearing *En Banc*. This Court's jurisdiction is invoked under 28 U.S.C. § 1254.

STATUTES INVOLVED IN THIS CASE

42 U.S.C. § 1983 provides, in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

On August 9, 1967, 16-year-old David Pearl crossed paths with four police officers of the City of Long Beach and became the victim of a vicious assault that left him blind in one eye. In fact, Pearl suffered two distinct beatings, one that occurred in the car and the other that was inflicted by a supervisor while Pearl lay on the floor at the police station. Because Pearl was rendered unconscious, he and his family were unaware of blows inflicted after he lost consciousness, until they were disclosed in 1999. As a result of these beatings he lost the vision in one eye and sustained other serious injuries. He had told the story of his fateful encounter with those police officers, three of whom are defendants in this case (a fourth, George Ellert, and a fifth, Sgt. James Rosengrave, are deceased), but no one—including the courts—had believed him until now. To this day, Pearl can relive in vivid detail the vicious blows that he received at the hands of the defendant police officers.

Pearl's testimony rings true today only because one of those police officers, defendant Vincent Milo, is at last telling the truth about what happened. In his statement, voluntarily made to the Nassau County District Attorney and formalized to plaintiff on June 1, 1999, Milo stated that police officer Leo Nolan picked out David Pearl as he was crossing the street because he had long hair, told him to get in the back of a police car for no reason other than to teach him a lesson about alleged respect for authority, beat his head with a round shaped blackjack and fists while defendant Milo held Pearl in a choke hold to steady him for Nolan's blows. Police Officer Ellert took out time from driving the police car to turn around and join in the battery with his own blackjack. When they arrived in the station house garage they were met by their supervisor, Sergeant

James Rosengrave, who kicked Pearl as he lay unconscious on the floor of the garage, and then directed the defendant officers to go "upstairs and do the paperwork".

It was during this session that Nolan and the other defendants conspired together and acted jointly to concoct a false story that would find its way into their official reports and resulted in their lying, under oath, to the grand jury, before a judge and a jury in later criminal proceedings, and in depositions in the civil case. They agreed, according to Milo, to falsely claim that the reason they beat David Pearl was that he had sworn at one of the officers, Nolan, and when he was ordered into the police car, struck Nolan. They claimed that he was beaten in the course of being subdued. Nor did the Pearls know that a local attorney, Leon Stern, who later represented the police officers in the civil proceedings, had been allowed by the District Attorney to be present during the grand jury presentation. Thus, after Pearl was charged with assault of a police officer, resisting arrest and disorderly conduct, Stern was able to help the officers shape their testimony to conform with the grand jury testimony of civilian witnesses.

The beating landed Pearl in the hospital for 10 days and, as a result of the blunt trauma to his face, at the age of 16, he lost the sight in his left eye. During his hospitalization he remained under police guard and there was even an attempt to arraign him at his bedside, but his doctors put a stop to the proceeding.[1]

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[1] As a result of the blows received Pearl was forced to undergo extensive medical and psychological care. His conditions continue to date. His family were literally forced out of town. Pearl was forced to drop out of college to focus on the trials. Although both of his parents were college-educated medical professionals, Pearl was more modest in his goals. His ambition was to be a licensed electrician. He had applied to the New York

The County prosecutor charged him with assaulting a police officer, a felony, resisting arrest and disorderly conduct. At the time he was charged, the defendant police officers knew, as did Sergeant James Rosengrave, that the charges were patently false. The only reason the defendant police officers charged Pearl with these offenses was to cover up their own wrongdoing.

Pearl was, as was the custom at that time, required to waive a jury trial to preserve his right to a juvenile offender status if convicted. With retained counsel at considerable expense, Pearl was tried and convicted in a bench trial. He was found guilty and on June 18, 1968 he was sentenced as a youthful offender to a prison term not to exceed three years, which was suspended by placing him on probation.

Pearl's conviction was overturned on the ground that his constitutional rights were violated by being forced to waive a jury trial. He was then tried a second time, once again with retained counsel, this time before a jury. The second trial ended, on September 15, 1971, with the jury deadlocked. Even though the second trial ended in a mistrial, the prosecutor indicated he would retry Pearl again.

While awaiting trial for a third time, a civil suit which Pearl and his mother, Florence Wexler, had initiated came on for trial in the Supreme Court of the County of Nassau.[2] They

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City Transit Authority to gain a license and union membership. He passed all the skill tests but was rejected for this position because of his now diminished eyesight.

[2] Unlike Pearl's subsequent federal lawsuit, the civil suit alleged one claim on behalf of Pearl. That was the claim of excessive force for which, it was claimed, created liability for the City of Long Beach as well as the individual police officers involved. In his federal lawsuit, Pearl has alleged

sued the City of Long Beach and the police officers involved for damages. The civil trial commenced on October 12, 1972, more than five years after the assault of the plaintiff. During this entire time the criminal charges against Pearl were unresolved.

At all three trials, two criminal and one civil, each of the defendants repeated their agreed-to story that Pearl had been injured resisting arrest and scuffling with the police. In fact, the defendant officers perjured themselves no less than seven times. They committed perjury in their official reports, in their discussion with the District Attorney of Nassau County, in their testimony before the Grand Jury, in their testimony at the three trials, and in their testimony in civil depositions . Defendant Milo now states that the testimony he and the other defendant officers gave about Pearl's resistance and scuffling was sheer fabrication. "[D]uring that time I never saw Pearl throw a punch or kick any of the police officers involved."

In his affidavits, Milo describes in detail a well developed pattern of brutality and corruption within the police department, including the officers involved in this case, their superiors and others. The use of black-jacks, rubber hoses and other forms of physical abuse of suspects was the norm. According to Milo, you were either in the group or you were on your own. At the very least you were bound to look the other way and keep your mouth closed. Otherwise, your life as a police officer would be miserable.

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numerous claims, in addition to the excessive force claim asserted under both federal and state law. They included, *inter alia*, the following: § 1983 failure to protect claim; § 1983 conspiracy to cover-up claim; § 1983 *Monell* claim against the City of Long Beach; false imprisonment, intentional and negligent infliction of emotional distress and negligence under state law; fraud under state law; and, a RICO claim under 18 U.S.C. § 1961 et seq.

Pearl's attorney at the civil trial had counseled that it was an uphill battle to convince a jury that four active police officers for the City of Long Beach were all lying and that Pearl, alone, was telling the truth. That same imbalance in testimony held true for the impending criminal trial as well. It was four policemen against a kid. The plaintiff also believed at the time that at least two witnesses, Sol Hedyea and Joseph Avalone, were intimidated into not testifying vigorously in his defense at the first two criminal trials.

It was against this backdrop that David Pearl and his mother agreed to settle the civil lawsuit. They received the sum of $30,000, ($25,000.00 to David Pearl and $5,000.00 to Florence Wexler), not enough money even to cover all the legal expenses of his criminal defense and his ongoing medical bills. The settlement, however, was motivated by reasons other than the amount of money that was offered. What enticed them to settle was the defendant police officers' representation that if Pearl settled the lawsuit, the police officers would inform the prosecutor that "they have no interest in prosecuting this criminal action any further."

Even though the record of the settlement conference in the civil case indicates that neither the presiding judge nor the officers were making a promise that Pearl would not be subject to further prosecution, at the time, Pearl and his mother rightly believed that it was the only way to get the police officers to have the case dropped. And, in fact, following the settlement of the civil case, no further criminal proceedings took place.

In June 1999, Mr. Milo, burdened by conscience, confessed to the Nassau County's District Attorney's Office, and subsequently submitted two affidavits which described the exact nature of the conspiracy to fabricate testimony, the actual con-

tent of the agreed upon lies and the retention of Attorney Stern to facilitate the conspiracy. It was only then that David Pearl learned the exact nature of the conspiracy, all of the participants in the conspiracy and that the conspiracy was part and parcel of a broader *de facto* policy and practice on the part of the City of Long Beach to violate the constitutional rights of its citizens.

On January 19, 2000, David Pearl filed this lawsuit under 42 U.S.C. § 1983, alleging violations of the Fourth, Fifth, Eighth and Fourteenth Amendments, as well as a claim under RICO, 18 U.S.C. § 1961 *et seq*. He sued the two surviving police officers of the five who had beaten him, Officer Whitman, who testified against the Petitioner and the City of Long Beach. The instant action seeks to revive earlier claims of excessive force and included new claims based upon conspiracy to cover up and failure to protect.

The trial court granted Respondents' 12(b)(6) motion based upon the statute of limitations and the matter was appealed to the United States Court of Appeals for the Second Circuit. On July 15, 2002, a panel of the Second Circuit issued an opinion which affirmed the lower court. In that opinion the court attempted to determine whether the Petitioner had a claim for either a late accrual of his claim, due to concealment, or for equitable tolling of the statute of limitations based upon the fraud of the Respondents.

In the end, the Court ruled that, for purposes of the outcome of the appeal, it mattered not whether the claims were analyzed as based upon accrual or upon tolling, that the fact of the conspiracy to lie and conceal were matters which were known or should have been known by David Pearl. The Court distinguished the strikingly similar case of *Bell v. City of Milwaukee*, 746 F. 2nd 1205 (7th Cir. 1984), on the grounds that the

victim in the Bell case was deceased, and could therefore not testify as to the truth in the face of a conspiracy to commit perjury; whereas, David Pearl had actual "specific, first-hand information about what had occurred.." What David Pearl lacked, the court concluded, was not information as to the existence of a cause of action, but rather "more persuasive evidence."

As to the claim that information as to the conspiracy to cover up was available to the Plaintiff only as of June, 1999, the Court held that although Pearl was not present at the meeting where the officers agreed to lie about this incident—indeed, he did not even know of the meeting or of the agreement until 1999—"he had reason to believe that they were lying and because their versions were identical, it was a reasonable inference that the officers had agreed" to lie.

The Petitioner filed a timely Petition for Rehearing *En Banc*, which was denied on October 9, 2002.

REASONS FOR GRANTING THE WRIT

I.

THE PETITION SHOULD BE GRANTED BECAUSE THE DECISIONS OF THE COURTS BELOW CONFLICTS WITH THE DECISION OF THE SEVENTH CIRCUIT IN *BELL V. CITY OF MILWAUKEE*, 746 F.2nd 1205 (7th Cir. 1984)

There are numerous facts, critical to his claims, which were intentionally concealed from David Pearl and his family and therefore, not known, nor even reasonably suspected, until the revelations of Mr. Milo, over thirty years later. Among these are: (1) that David Pearl was beaten while unconscious;

(2) that the beating while unconscious was inflicted by one Sergeant James Rosengrave; (3) that there was a meeting between Officers Nolan, Ellert and Milo at which Nolan told the other officers what to say to which they agreed, knowing that the version that Nolan "laid out" was fabricated for purposes of grand jury and trial testimony; (4) that the grand jury proceedings were accessible, with the permission of the District Attorney, to the lawyer for the police officers while the testimony of other witnesses was taken, in violation of New York law, N.Y. Criminal Procedure Law § 190.25(3); (5) that the testimony of those witnesses was disclosed to the officers, in violation of N.Y.Criminal Penal Law § 215.70, so that the officers could "adjust" their testimony,[3] and (6) that there was a clear policy within the Long Beach Police Department, that included others (e.g. Leon Stern), of brutality and cover-up.

Even assuming, *arguendo*, that the test for determining the applicability of the statute of limitations, in a case where a denial of access to the courts is alleged, is whether the victim had actual first-hand knowledge of the circumstances giving rise to the underlying constitutional violation, that test does not apply to these facts. Neither David Pearl nor his family had first hand knowledge of the beating which occurred after he became unconscious. Nor could they have reasonably been expected to. The same is true as to the identity of Sergeant

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[3] It is notable that this case was dismissed pursuant to Rule 12(b)(6). Given the fact bound standard which the Second Circuit applied to the application of the statute of limitations, i.e. whether the Plaintiff had "specific first-hand information" and whether "he had reason to believe . . . (the officers) were lying," it is at best curious that the panel made a number of factual findings with regard to a situation, which is far from clear.

Rosengrave who inflicted that portion of the beating.[4] Similarly, David never had "first-hand information" as to the existence of the conspiracy or the role of the Respondents' lawyer in the grand jury.

These problems which confronted the Petitioner demonstrate the cumbersome and unworkable nature of the test applied by the Second Circuit in this case. With a number of potential claims, factual scenarios and defendants to consider, the court must analyze each circumstance with regard to the plaintiff's state of mind as affected by the alleged conspiracy to keep him in the dark.[5]

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[4] Indeed, due to the conspiracy, Rosengrave was never sued in the first lawsuit. His identity was unknown to the Petitioner, who was unconscious at the time of their encounter, and was never revealed because the Sergeant's name never surfaced in the criminal trials.

[5] This consideration demonstrates the fallacy of the Second Circuit's analysis of the application of the statute of limitations to the claim involving the City's policy, brought under *Monell v. Department of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). The Court below stated that "Pearl has made no showing that the City of Long Beach actively concealed from him the existence of a municipal policy concerning either police brutality or false testimony concerning such misconduct." Given the procedural posture of this case, an appeal from dismissal, pursuant to Rule 12(b)(6), the requirement that Pearl make any showing beyond pleading such a policy is inappropriate. *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 164, 113 S.Ct. 1160, 122 L.Ed.2d 517 (1993). However, assuming some obligation of the Plaintiff to make a "showing," Milo's affidavit states that "all" members of the Long Beach Police Department "acquiesced" in the policy of brutality and that acquiescence included "look(ing) the other way and not . . . open(ing) your mouth." Clearly such acquiescence would have been actionable and would have established a *Monell* claim even earlier than when this Court decided that case. *See City of Canton v. Harris*, 489 U.S. 378, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989); *see also Spell v. McDaniel*, 824 F.2nd 1380 (4th Cir. 1987); *McNabola v. Chicago Transit Authority*, 10 F. 3rd 501 (7th Cir. 1993). Because, the plaintiff was entitled,

The fact that the Second Circuit's approach is so fact bound and requires such an awkward appellate inquiry, favors the more workable and reasonable approach applied by the Seventh Circuit in *Bell v. City of Milwaukee,* 746 F.2nd 1205 (7th Cir. 1984). That case has a striking factual similarity to this. In 1958, a young man was run down by police officers and shot in the back and killed by one of them. The shooter then planted a knife on the victim's body. The officers then told a fabricated story to the to the investigators who soon arrived on the scene. As the days passed, both the physical evidence and the apparent contradictions in the officers stories strongly indicated to the victim's family that the police were lying and that Daniel Bell had been wrongfully killed. As a result, Bell's father filed a wrongful death action in state court in 1960. The case was purportedly settled, after a mistrial, for $1,800, although no release was ever signed and no settlement check ever cashed. Eighteen years later, in 1978, one of the conscience stricken police officers confessed the true facts of the shooting ("Bell . . . made no lunge with a knife . . . (T)he knife . . . had been planted. . . .") and of the subsequent cover up and perjury. *Id.*, 746 F.2d at 1223. In 1979, twenty one years after the death of Daniel Bell, the Bell family filed a case in federal court under 42 U.S.C. § 1983[6] and the Defendants asserted, as a defense, the statute of limitations.

The Seventh Circuit acknowledged that, as a result of the officers' numerous, contradictory and conflicting statements,

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given the procedural posture of this case, to every favorable inference to be drawn from the facts pled, *Conley v. Gibson*, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957), most certainly the Milo affidavit permitted a reasonable inference that a part of the "policy" sued upon was to actively conceal, from the public and from its victims, the policy of police brutality.

[6] Claims were also brought under §§ 1981, 1985 and 1986, but they are not pertinent to this discussion.

the plaintiffs had never believed the police officers' rendition of the facts of the shooting. Further, immediately after the shooting, the physical evidence affirmatively pointed in the direction of an indefensible shooting. Still, the court rejected the statute of limitations defense because the Defendants had covered up the truth of what led to the shooting and that concealment resulted in the plaintiffs' failure to pursue more effective remedies in a § 1983 lawsuit. Thus, the court concluded that the plaintiffs were not time barred. The "cornerstone of our decision in *Bell* was that the conspiracy had prevented a full and open disclosure of facts crucial to the cause of action, rendering hollow the plaintiffs' right of access." *Vasquez v. Hernandez*, 60 F.3rd 325, 329 (7th Cir 1995).

Most certainly, claims which the Second Circuit found to be time barred in this case and in an earlier decision, *Paige v. Police Department of Schenectady*, 264 F. 3rd 197 (2nd Cir. 2001), would have survived in the Seventh Circuit under the standard articulated in *Bell* and *Vasquez*. In *Paige* the Second Circuit sets forth the same standard as in *Pearl*, but more concisely: "We agree with the district court that the appellant had *enough information* in 1986, when she became an adult, to bring her § 1983 assault claim, and therefore the claim is now time-barred." *Paige v. Police Department, supra* at 199 (emphasis added).

Based upon this standard, one can understand how the Second Circuit might later reason that David Pearl should have understood the existence of a conspiracy, of which he no direct knowledge,[7] to commit perjury and coerce him into an inade-

[7] However, even assuming, *arguendo*, the propriety of the Second Circuit's standard, it was applied unevenly, indeed unfairly, in this case. Consider, for example, the way in which the Court in *Pearl* distinguishes

quate settlement because the *Pearl/Paige* standard allows courts to make the determination as to how much knowledge is "enough", even on motions brought pursuant to F.R.C.P. 12(b)(6). However, it is difficult to imagine the same set of facts not being viewed as a "conspiracy (that) had prevented a full and open disclosure of facts crucial to the cause of action, rendering hollow the plaintiffs' right of access." *Vasquez, supra.* Similarly, it is difficult to imagine, as well, the Seventh Circuit rejecting David Pearl's *Monell* claim, that there was a policy, that prevailed at "all" levels within the Long Beach Police Department, to "look the other way and not . . . open your mouth."

Moreover, the Court in *Pearl* was in error when it concluded that "Pearl makes no allegation that the allegedly false testimony against him resulted from a conspiracy between, on the one hand, the testifying police offices and, on the other hand, any other official about whose involvement he was unaware." (App. A at 25a) In fact, Pearl learned only for the first time in 1999 of the identify of other officials, e.g., Sgt. Rosengrave, about whose involvement he was unaware. He also learned for the first time of the involvement of the officers' lawyer, Leon Stern, in the conspiracy to cover-up the truth.

In *Pearl*, the Second Circuit alludes to broad equitable language from *Bell*. That language is worthy of repetition:

David Pearl from the Bell family. The Court forecloses Pearl because he had the benefit of "first-hand information," App. A at 22a, whereas the Bell family had to interpret the evidence. On the other hand, it bars Pearl with regard to his conspiracy claim because he "had reason to believe" that there was such a conspiracy. The *Pearl* court, however, does not presume to measure whether the Bell family "had reason to believe" the existence of a conspiracy or, indeed, of a cause of action.

> (A)llegations of a broadly based, racially motivated conspiracy by public officials and employees designed to conceal and cover-up the wrongful acts of a City of Milwaukee police officer, if true, are allegations of conduct so unfair, misleading, and outrageous as to outbalance the public's interest . . . in setting a limitation on bringing an action and thus carves an exception out of the statute of limitations . . .

Bell, 746 F.2d at 1231.

Viewing the above quoted language from *Bell* as based in state law, the Second Circuit, in *Pearl* rejects this equitable approach, concluding instead that, "[n]either New York case law nor ours adopts such an expansive approach to equitable tolling." (App., 23a). Petitioner respectfully suggests that this Court's opinion in *Harbury, sub silentio,* adopts these equitable principles as substantive federal and constitutional law and thereby reconciled any disagreement between the circuits on this point in a way that is contrary and at odds with the Second Circuit's decision below. We ask this Court, at this time, to do so explicitly.

II.

THE PETITION SHOULD BE GRANTED BECAUSE THE DECISIONS OF THE COURTS BELOW CONFLICT WITH THIS COURT'S DECISION IN *CHRISTOPHER V. HARBURY*, 536 U.S. 403 (2002)

The decisions of the courts below also conflict with this Court's recent decision in *Christopher v. Harbury*, 536 U.S. 403, 122 S.Ct. 2179, 153 L.Ed.2d 413 (2002), which clearly defined the circumstances under which a constitutional claim

based upon denial of access to the courts will be allowed. The Second Circuit in this case drew the following distinction, which was critical to the Court's decision in this case:

> In applying the doctrine of equitable tolling, we have made an important distinction between fraudulent concealment of the existence of a cause of action and the fraudulent concealment of facts that, if known, would enhance a plaintiff's ability to prevail as to a cause of action of which the plaintiff was previously aware.

(App A, at 21a)

However, such a distinction becomes irrelevant after this Court's decision in *Harbury*. In *Harbury*, this Court referred to two categories of claims which may be constitutionally protected under the constitutional right of access to court. The first category of claims involve systemic official action which frustrates a plaintiff or plaintiff class in preparing and filing suits at the present time.

> The second category covers claims not in aid of a class of suits yet to be litigated, but of specific cases that cannot now be tried (or tried with all material evidence), no matter what official action may be in the future. The official acts claimed to have denied access may allegedly have caused the loss or inadequate settlement of a meritorious case, *e.g., Foster v. Lake Jackson*, 28 F.3d 425, 429 (C.A.5 1994); *Bell v. Milwaukee*, 746 F.2d 1205, 1261 (C.A.7 1984) ("[T]he cover-up and resistance of the investigating police officers rendered hollow [the plaintiff's] right to seek redress"), the loss of an opportunity to sue, *e.g., Swekel v. River Rouge*, 119 F.3d 1259, 1261 (C.A.6 1997) (police cover-up extended throughout "time to file suit . . . under . . . statute of limitations"),

> or the loss of an opportunity to seek some particular order of relief, as Harbury alleges here. These cases do not look forward to a class of future litigation, but backward to a time when specific litigation ended poorly, or could not have commenced, or could have produced a remedy subsequently unobtainable. The ultimate object of these sorts of access claims, then, is not the judgment in a further lawsuit, but simply the judgment in the access claim itself, in providing relief obtainable in no other suit in the future.

Harbury, 122 S.Ct. at 2186 (footnotes omitted). It is noteworthy that *Harbury* cites both *Bell v. City of Milwaukee* and *Vasquez v. Hernandez*, in support of this proposition.

The rationale for recognizing that a plaintiff may still seek redress for official conspiracies to cover-up which caused the loss or inadequate settlement of a meritorious case applies with full force and effect to the case *sub judice*. As this Court stated in *Harbury*, "the very point of recognizing any access claim is to provide some effective vindication for a separate and distinct right to seek judicial relief for some wrong." *Id.* This principle of providing effective vindication for violation of important constitutional rights is a bedrock of our constitutional jurisprudence. As Chief Justice John Marshall stated in *Marbury v. Madison*, 5 US 137, 163, 1 Cranch 137 (1803), quoting from Blackstone's *Commentaries*, "it is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law whenever that right is invaded." Not only must there be a remedy, but that remedy must constitute "proper redress," *id.*, for the right that has been violated. Because of the conspiracy by the individual defendant police officers in this case to cover-up the true nature of their shameful and wrongful conduct, and the duress he felt

with the criminal prosecution hanging over his head, which at that point was five years old and showed no signs of abating, David Pearl was denied "proper redress" for the violations of his rights which occurred on August, 9, 1967.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

By /s/ WILLIAM H. GOODMAN

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APPENDIX A

TABLE OF CONTENTS
APPENDIX

Page

Order of the U.S. District Court,
Eastern District of New York,
dated July 10, 2001..... 1a

Judgment of the U.S. District Court,
Eastern District of New York,
dated July 17, 2001..... 3a

Opinion of the U.S. Court of Appeals
for the Second Circuit,
dated July 15, 2002..... 5a

Mandate of the U.S. Court of Appeals
for the Second Circuit,
filed July 15, 2002 ..... 32a

Order of the U.S. Court of Appeals
for the Second Circuit,
filed October 9, 2002..... 34a

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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00 CV 0251 (LDW)(MLO)

DAVID PEARL,

Plaintiff,

against

THE CITY OF LONG BEACH; LONG BEACH CITY POLICE DEPARTMENT; LONG BEACH POLICE OFFICER LEO NOLAN; LONG BEACH POLICE OFFICER ARTHUR WHITMAN; and LONG BEACH POLICE OFFICER VINCENT MILO,

Defendants.

ORDER

Defendants The City of Long Beach, Long Beach City Police Department, Leo Nolan, Arthur Whitman and Vincent Milo by and through their attorneys having regularly moved for an order pursuant to Fed.R.Civ.P. 12(b)(6) dismissing the complaint against defendants; and upon reading and filing the motion papers filed in support and in opposition to said motions and after hearing oral argument on June 27, 2001 and after due deliberation having been had, the decision having been rendered by this Court upon the conclusion of oral argument on June 27, 2001 granting

defendants' motion in its entirety dismissing the complaint;

NOW, upon motion of defendants' counsel, is is hereby

ORDERED that defendants' motion seeking to dismiss the complaint in its entirety is granted. The Clerk of Court is directed to enter judgment dismissing the complaint and to close the file in this action.

ENTERED AND ORDERED this 10th day of July, 2001.

[ILLEGIBLE]
U.S.D.J.
Central Islip, NY

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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00 CV 0251 (LDW)
Filed July 18, 2001

DAVID PEARL,

Plaintiff,

against

THE CITY OF LONG BEACH; LONG BEACH CITY POLICE DEPARTMENT; LONG BEACH POLICE OFFICER LEO NOLAN; LONG BEACH POLICE OFFICER ARTHUR WHITMAN; and LONG BEACH POLICE OFFICER VINCENT MILO,

Defendants.

JUDGMENT

An Order of Hon. Leonard D. Wexler, United States District Judge, having been filed on July 12, 2001, granting the defendants' motions to dismiss the plaintiff's complaint pursuant to Fed. R. Civ. P. 12(b)(6), and dismissing the complaint, it is

ORDERED AND ADJUDGED that plaintiff DAVID PEARL take nothing of defendants THE CITY OF LONG BEACH; LONG BEACH CITY POLICE DEPARTMENT; LONG BEACH POLICE OFFICER LEO NOLAN, LONG BEACH POLICE OFFICER ARTHUR

WHITMAN; and LONG BEACH POLICE OFFICER VINCENT MILO; and that the complaint is hereby dismissed in its entirety.

ROBERT C. HEINEMANN
Clerk of the Court

By: /s/ JOSEPH DI TALIA
JOSEPH DI TALIA
Deputy Clerk-in-Charge

Dated: Central Islip, New York
July 17, 2001

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term 2001

Argued: April 2, 2002 Decided: July 15, 2002

Docket No. 01-7914

DAVID PEARL,

Plaintiff-Appellant,

v.

THE CITY OF LONG BEACH, LONG BEACH CITY POLICE DEPARTMENT, LONG BEACH POLICE OFFICER LEO NOLAN, ARTHUR WHITMAN and LONG BEACH POLICE OFFICER VINCENT MILO,

Defendants-Appellees.

Before:

WALKER, *Chief Judge,*
NEWMAN, and KEARSE, *Circuit Judges.*

Appeal from the July 18, 2001, judgment of the United States District Court for the Eastern District of New York (Leonard D. Wexler, District Judge), dismissing as time-barred a suit alleging police brutality.

Affirmed.

STEPHAN H. PESKIN, Tolmage, Peskin, Harris & Falick, New York, N.Y. (Jonathan C. Moore, New York, N.Y.; William H. Goodman, Center for Constitutional Rights, New York, N.Y., on the brief), *for Plaintiff-Appellant.*

COREY E. KLEIN, Acting Corporation Counsel, Long Beach, N.Y., *for Defendants-Appellees The City of Long Beach and Long Beach City Police Department.*

ORRIT HERSHKOVITZ, Snitow Kanfer Holtzer & Millus, LLP, New York, N.Y. (Paul F. Millus, New York, N.Y., on the brief), *for Defendant-Appellee Leo Nolan.*

MICHAEL T. HOPKINS, Hopkins & Kopilow, Garden City, N.Y., *for Defendant-Appellee Arthur Whitman.*

CHRISTINE MCINERNEY, Ruskin, Moscou, Evans & Faltischek, P.C., Uniondale, N.Y., *submitted papers for Defendant-Appellee Vincent Milo.*

JON O. NEWMAN, *Circuit Judge.*

This appeal illustrates, in a dramatic context, the tension between the judicial system's instinct to provide a remedy for every wrong and the system's recognition that the passage of time must leave some wrongs without a remedy. David Pearl appeals from the July 18, 2001, judgment of the District Court for the Eastern District of New York (Leonard D. Wexler, District Judge) dismissing, as barred

by the statute of limitations, his suit seeking damages for police brutality allegedly inflicted upon him 35 years ago. Acknowledging the normally applicable barrier of the statute of limitations, Pearl contends that he may sue at this late date because the settlement of his prior timely lawsuit was obtained by fraud, his currently pleaded causes of action were concealed by fraud, and he can now establish the truth through the testimony of a conscience-stricken police officer who admits that he participated in the brutality and that he and the other defendants lied about Pearl's claim. We are obliged to agree with the District Court that Pearl's evidence, accepted as true for purposes of this appeal, does not permit his current suit to proceed. We therefore affirm.

Background

The alleged assault. Pearl alleges the following circumstances. In 1967, Pearl, then sixteen years old, was stopped on the street and brutally attacked by four City of Long Beach (Nassau County, N.Y.) police officers—Appellees Leo J. Nolan and Vincent F. Milo, Jr., and George F. Ellert and Sergeant James Rosengrave, both now deceased. As detailed in Pearl's 1968 state court civil complaint, on August 9, 1967, he was called over to a police car by officer Nolan. After asking Pearl a few questions, Nolan told him to get into the back of the police car. In the course of being transported to the police station, Pearl was repeatedly punched in the stomach and face by Nolan, while restrained by Officer Milo. Officer Ellert drove the car. Nolan and the other officers continued to hit and kick Pearl at the police station, causing Pearl to lose consciousness for a period of time. Pearl's injuries required a ten-day

period of hospitalization and left him permanently blind in one eye.

The officers, including Appellee Arthur Whitman, testified to a different version of the episode at two state court criminal trials. They said that Pearl swore at Officer Whitman, who was on traffic patrol, as he was walking by. Officer Nolan called Pearl over to his car after hearing him swear. Pearl then swore at Nolan and, after getting into the police car, struck him. The officers (other than Whitman) used force in the car and in the station only in order to subdue Pearl.

The criminal case. The Nassau County prosecutor charged Pearl with assaulting a police officer, resisting arrest, and disorderly conduct. Pearl was initially convicted at a bench trial, but the conviction was overturned on appeal because Pearl had unconstitutionally waived his right to a jury trial, which Pearl had done in order to maintain juvenile offender status. *People v. David P.,* 35 A.D.2d 584, 315 N.Y.S.2d 398 (2d Dep't 1970). The second trial ended in a deadlocked jury and a mistrial. At each trial, all four officers involved in the incident testified against him, as did Officer Whitman. Pearl was informed that prosecutors would proceed with a third trial.

The state court civil case. Just prior to sentencing in the first trial, Pearl and his mother, Florence Wexler, brought a civil suit in Nassau County Superior Court under 42 U.S.C. § 1983 against the City of Long Beach and Officers Nolan, Milo, and Ellert, alleging excessive force by them, and recklessness on the part of the City in allowing its officers to assault Pearl. In their pretrial depositions for the civil case, the officers again gave their account of the episode. In 1972, with the third criminal trial impending,

Pearl and his mother chose to settle their civil suit. At the settlement hearing, Pearl's mother made it clear that the sole reason she agreed to settle was that the prosecutor had indicated that the criminal charges would be dropped if Pearl settled. Pearl's attorney advised that it would be an uphill battle to convince a jury in the civil trial and the impending criminal trial that four police officers were lying on the stand. Pearl also believed that his witnesses were intimidated by the police and failed to fully support his defense. Pearl and his mother agreed to settle the civil case for $30,000, an amount that did not cover his medical bills and the fees and expenses of his criminal defense. The individual police officers and the City were released with respect to "all actions and claims arising out of the incident which occurred on August 9, 1967." The City paid the $30,000.

Milo's recantation. In June 1999, Milo, one of the officers involved in the 1967 episode, submitted a sworn statement to the Nassau County District Attorney, stating that the officers' testimony in the Pearl case was fabrication. He confessed that he "never saw Pearl throw a punch or kick any of the police officers involved," and that "Nolan laid out the story as to what the reports should say."

In a second affidavit given in May 2000, Milo recounted the extent of brutality within the Long Beach Police Department: "[T]here existed a pattern of brutality [within the Department] in which not all police officers participated but in which all acquiesced"; "[b]eatings by senior officers, especially the detectives to extract confessions were common place"; he recalled other instances of suspects being beaten and that it was "nothing out of the ordinary, just standard operating procedure"; and "[b]lack-

jacks, clubs and rubber hoses and telephone books were all part of our 'unofficial' equipment."

He also stated: "When we were sued by Mr. Pearl we insisted that the City hire as our attorney Leon Stern. He was most familiar with the facts of the case as he was allowed to be present in the Grand Jury room while the Pearl case was being present [ed]. In fact, he gave us detailed accounts of each civilian witness'[s] testimony so that we could adjust our presentation. . . . [H]e was 'one of the boys' while an Assistant District Attorney and understood the way we operated." Milo also stated that he left the Long Beach Police Department and transferred to the Long Beach Fire Department.

Pearl's current lawsuit. Milo's first affidavit prompted Pearl to institute the instant lawsuit on January 19, 2000, asserting federal causes of action under 42 U.S.C. § 1983 and RICO, 18 U.S.C. § 1961 *et sec.*, claims under the Fourth, Fifth, Eighth, and Fourteenth Amendments, and state law claims. The defendants are Nolan and Milo, the two officers still living who participated in the episode, Whitman, who testified against Pearl, the City, and the Long Beach Police Department. Pearl seeks to revive claims arguably extinguished by the 1972 settlement, such as his excessive force claim against the individual officers, and also seeks to assert, purportedly for the first time, claims that he alleges became known to him only in 1999. The latter include: section 1983 claims against the officers for conspiracy to cover-up, against the City for failure to protect, and against the City based on the Supreme Court's decision in *Monell v. Department of Social Services*, 436 U.S. 658 (1978); false imprisonment, intentional and negligent infliction of emotional distress and negligence under state law; fraud under state law; and a RICO claim.

Judge Wexler granted Defendants' 12(b)(6) motion, dismissing Pearl's Complaint on statute of limitations grounds.

This appeal followed.

Discussion

In section 1983 actions, the applicable limitations period is found in the "general or residual [state] statute [of limitations] for personal injury actions," *Owens v. Okure* , 488 U.S. 235, 249-50 (1989), and the parties agree that in this case that period is three years, *see* N.Y. C.P.L.R. § 214(5) (McKinney 1990).[1] The Appellant contends that the three-year statute of limitations does not bar his pending lawsuit, even though it was filed 32 years after the 1967 episode, because the Appellees concealed his causes of action from him by their false statements in their official reports, and their false testimony in the two criminal trials and in depositions in the state court civil suit that was settled. As the Appellant frames his contention, the statute of limitations has been "tolled" by reason of the Appellees' fraudulent concealment. Brief for Appellant at 26-36. This contention requires consideration of several related issues: when does a cause of action accrue, what circumstances toll the running of a period of limitations after a cause of action accrues, and what circumstances estop a defendant from asserting a limitations defense? Preliminary to considera-

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[1] A four-year statute of limitations is applicable to claims brought under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 *et seq. See Agency Holding Corp. v. Malley-Duff & Associates, Inc.*, 483 U.S. 143, 156 (1987). Even if RICO applied to Pearl's claims, the extra one year would not affect our disposition of this appeal.

tion of these issues is the choice of law question: whether state or federal law applies to their resolution.

Federal law determines when a section 1983 cause of action accrues, *Heard v. Sheahan*, 253 F.3d 316, 317-18 (7th Cir. 2001); *Harvey v. Waldron*, 210 F.3d 1008, 1013 (9th Cir. 2000); *Singleton v. City of New York*, 632 F.2d 185, 191 (2d Cir. 1980),[2] and we have ruled that accrual occurs " 'when the plaintiff knows or has reason to know of the injury which is the basis of his action,' " *id.* (quoting *Bireline v. Seagondollar*, 567 F.2d 260, 263 (4th Cir. 1977)); *see Pinaud v. County of Suffolk*, 52 F.3d 1139, 1156 (2d Cir. 1995). As the ensuing discussion will show, this concept of accrual, sometimes referred to as the "discovery rule," *e.g.*, *TRW, Inc. v. Andrews*, 122 S. Ct. 441, 446-47 (2001), is related to and sometimes confused with the concept of fraudulent concealment of a cause of action.

The Supreme Court has instructed that in section 1983 actions, we borrow not only a state's limitations period but also its "tolling rules," *Board of Regents v. Tomanio*, 446 U.S. 478, 484-86 (1980); *see Keating v. Carey*, 706 F.2d 377, 381-82 (2d Cir. 1983), unless applying the state's tolling rules "would defeat the goals of the federal statute at issue," *Hardin v. Straub*, 490 U.S. 536, 539 (1989) . The seemingly clear-cut bifurcation between accrual, governed

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[2] It is arguable that because section 1983 is to "be read against the background of tort liability" for purposes of holding a defendant responsible "for the natural consequences of his actions," *Monroe v. Pape*, 365 U.S. 167, 187 (1961), and for purposes of good faith immunity, *Pierson v. Ray*, 386 U.S. 547, 556-57 (1967), accrual of a section 1983 cause of action should also be a matter of state law. However, it is well settled under our precedents that accrual is a matter of federal law. *See, e.g.*, *Keating v. Carey*, 706 F.2d 377, 382 (2d Cir. 1983); *Singleton*, 632 F.2d at 191.

by federal law, and tolling rules, governed by state law, obscures two matters. First, it is not clear from *Tomanio*, whether in section 1983 actions we are to borrow only a state's "tolling rules" that have been incorporated into state statutes or, in addition, other aspects of a state's common law concerning avoidance of a statute of limitations that either have been labeled "tolling" or serve an equivalent function, *i.e.*, to relieve the plaintiff from the bar of a statute of limitations. Second, it is not clear whether state or federal law applies where the circumstances governing accrual are similar, if not identical to, circumstances pertinent to a state tolling rule, a recurring issue in cases where tolling is sought on the ground of fraudulent concealment.[3]

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[3] The significance of fraudulent concealment to a plaintiff's entitlement to sue was recognized by the Supreme Court as early as 1874, when the Court ruled that in an equitable action based on fraud, "where the ignorance of the fraud has been produced by affirmative acts of the guilty part in concealing the facts from the other, the statute [of limitations] will not bar relief" if suit is promptly brought after discovery of the fraud. *Bailey v. Glover*, 88 U.S. (21 Wall.) 342, 34748 (1874) (W.H. & O.H. Morrison 1875). The Court appears to have considered the matter one of accrual because it went on to note that where a party injured by fraud remains ignorant of the fraud through no fault of its own, "the statute does not *begin to run* until the fraud is discovered," even though there has been no concealment of the fraud by the other party. *Id.* at 348 (emphasis added). The Court subsequently invoked this doctrine in equitable actions to enforce federal rights, *see Holmberg v. Albrecht*, 327 U.S. 392, 396-97 (1946). Whether considered a matter of accrual or a matter of some form of equitable relief from a limitations bar, federal courts have applied the doctrine that originated with *Glover* and *Holmberg*, to federal causes of action at law other than fraud, *see, e.g.*, *Pinaud*, 52 F.3d at 115758 (false arrest and malicious prosecution); *Cerbone v. International Ladies' Garment Workers' Union*, 768 F.2d 45, 48-49 (2d Cir. 1985) (age discrimination); *Keating*, 706 F.2d at 381-82 (discrimination based on political affiliation); *Barrett v. United States*, 689 F.2d 324, 327-30 (2d Cir. 1982) (Federal Tort Claims Act), and,

The first matter—the scope of borrowed tolling rules—is the easier of the two. *Tomanio* noted that New York has by statute codified "a number of the tolling rules developed at common law," 446 U.S. at 486, citing statutory provisions concerning the defendant's absence from the state or residence under a false name, and the plaintiff's disability such as infancy, insanity, or imprisonment, *id.* at 486 n.6 (citing N.Y. C.P.L.R. §§ 207, 208 (McKinney 1972, Supp. 1979-1980)). Because the Supreme Court wanted section 1983 actions to be subject to state "tolling rules," it seems likely that both statutory and common law rules are to be borrowed. *See Shropshear v. Corporation Counsel of Chicago*, 275 F.3d 593, 596 (7th Cir. 2001) (borrowing state common law rule of equitable tolling); *Wade v. Danek Medical, Inc.*, 182 F.3d 281, 288-90 (4th Cir. 1999) (same).

The second matter—the overlap between accrual and tolling based on fraudulent concealment—is more troublesome, in part because of the varying uses of terminology. The taxonomy of tolling, in the context of avoiding a statute of limitations, includes at least three phrases: equitable tolling, fraudulent concealment of a cause of action, and equitable estoppel. The initial difficulty encountered in trying to compare accrual, governed by federal law, with tolling, governed by state law, is that the reported decisions of the federal and state courts do not always mean the same thing by their use of these phrases, and phrases to which some judges ascribe different meanings are used interchangeably by other judges.

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pertinent to the instant case, to claims of police misconduct brought under section 1983, *see Bell v. City of Milwaukee*, 746 F.2d 1205, 1228-34 (7th Cir. 1984).

In the Seventh Circuit, Judge Posner has identified two "tolling doctrines": "equitable estoppel" and "equitable tolling." *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 450-51 (7th Cir. 1990); *see Shropshear*, 275 F.3d at 595. He uses "equitable estoppel" to mean a bar that prevents a defendant from relying on a statute of limitations as a defense where "the defendant takes active steps to prevent the plaintiff from suing in time, as by promising not to plead the statute of limitations." *Cada*, 920 F.2d at 450-51. He notes that "equitable estoppel" is sometimes called "fraudulent concealment," *id.* at 451, but "must not be confused with efforts by a defendant *in a fraud case* to conceal the fraud," *id.* (emphasis added). If successful, those efforts, he says, "postpone the date of accrual [and] are thus within the domain of the discovery rule," *id.* (citation omitted), *i.e.*, the rule that determines when a cause of action accrues.[4] However, in his more recent discussion of the issue, he calls fraudulent concealment "one instantiation" of "equitable estoppel." *Shropshear*, 275 F.3d at 597. He uses "equitable tolling" to mean suspension of a statute of limitations where the plaintiff "despite all due diligence . . . is unable to obtain vital information bearing on the existence of [a] claim . . . [absent] a wrongful—or any—effort by the defendant to prevent the plaintiff from suing." *Cada*, 920 F.2d at 451. In the Third Circuit, Judge Lewis has viewed fraudulent concealment of a cause of action as one circumstance warranting "equitable tolling," *Oshiver v. Levin, Fishbein, Sedran & Berman*, 38 F.3d 1380, 1387

[4] It is not clear whether Judge Posner views "fraudulent concealment" as postponing accrual only in fraud cases, to which he explicitly refers, or in any case in which a defendant conceals a cause of action.

(3d Cir. 1994);[5] he has regarded the discovery rule (accrual) as concerned with a plaintiff's awareness, actual or imputed, of "actual injury" and equitable tolling as concerned with awareness, actual or imputed, of "the facts supporting the plaintiff's cause of action," *id.* at 1390; *see Forbes v. Eagleson*, 228 F.3d 471, 486 (3d Cir. 2000) (following terminology of *Oshiver*).

Our Court has used "equitable tolling" to mean fraudulent concealment of a cause of action that has "in some sense accrued earlier," *see Pinaud*, 52 F.3d at 1156 (characterizing the plaintiff's argument to allege that "even if [the plaintiff's claims] in some sense accrued earlier, the statute of limitations was equitably tolled by virtue of the individual defendants' fraudulent concealment of their actions"), and to mean fraudulent concealment that postpones the accrual of a cause of action, *Cerbone v. International Ladies' Garment Workers' Union,* 768 F.2d 45, 48 (2d Cir. 1985) ("Under this doctrine [of equitable tolling], the statute does not begin to run until the plaintiff either acquires actual knowledge of the facts that comprise his cause of action or should have acquired such knowledge through the exercise of reasonable diligence . . . The doctrine has been applied . . . where the facts show that the defendant engaged in conduct, often itself fraudulent, that concealed from the plaintiff the existence of the cause of action") (internal quotation marks and citation omitted). We have also used "equitable estoppel" to mean fraudulent

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[5] Other circumstances noted in the Third Circuit to warrant equitable tolling are "where the plaintiff in some extraordinary way has been prevented from asserting his or her rights" and "where the plaintiff has timely asserted his or her rights mistakenly in the wrong forum." *Oshiver*, 38 F.3d at 1387 (citing *School District of Allentown v. Marshall*, 657 F.2d 16, 19-20 (3d Cir. 1981)).

concealment that postpones the running of the statute of limitations, *see Keating*, 706 F.2d at 382 (noting that under federal law "when the defendant fraudulently conceals the wrong, the time does not begin running until the plaintiff discovers, or by the exercise of reasonable diligence should have discovered, the cause of action" and ruling that New York has adopted "the same equitable estoppel doctrine").

New York appears to use the label "equitable estoppel" to cover both the circumstances "where the defendant conceals from the plaintiff the fact that he has a cause of action [and] where the plaintiff is aware of his cause of action, but the defendant induces him to forego suit until after the period of limitations has expired." Joseph M. McLaughlin, *Practice Commentaries*, N.Y. C.P.L.R. C201:6, at 63 (McKinney 1990). *See Simcuski v. Saeli*, 44 N.Y.2d 442, 406 N.Y.S.2d 259 (1978) (equitable estoppel because of concealment of cause of action); *Kamruddin v. Desmond*, 2002 WL 787558 (N.Y. App. Div. 2d Dep't Apr. 29, 2002) (equitable estoppel because of concealment of medical records that were needed to pursue malpractice cause of action of which plaintiff was aware); *Croop v. Odette*, 29 Misc. 2d 606, 219 N.Y.S.2d 805 (Sup. Ct. Oneida Cty. 1960) (equitable estoppel because of defendant's representation that compensation would be paid without need for lawsuit), *aff'd*, 14 A.D.2d 724, 218 N.Y.S.2d 532 (4th Dep't 1961); *see also Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ohnuma*, 161 Misc. 2d 423, 432, 613 N.Y.S.2d 811, 816 (Sup. Ct. N.Y. Cty. 1994) (equitable tolling concerns when statute of limitations begins to run), *rev'd on other grounds*, 218 A.D.2d 572, 630 N.Y.S.2d 724 (1st Dep't 1995). In other states, concealment is sometimes referred to as "equitable tolling,"

e.g., *Snapp & Associates Insurance Services, Inc. v. Robertson*, 96 Cal. App. 4th 884, 890-91, 117 Cal. Rptr. 331, 334-35 (2002), or simply the reason that the statute of limitations is "tolled," *e.g.*, *Walk v. Ring*, ___ Ariz ___, , 44 P.3d 990, 999 (2002), and at least one state uses "tolling" to concern both accrual and stopping of the statute of limitations, *see Major League Baseball v. Morsani*, ___ Fla. ___, ___, 790 So.2d 1071, 1079 (2001) ("Tolling, strictly speaking, is concerned with the point at which the limitations period begins to runs and with the circumstances in which the running of the limitations period may be suspended.").

Bearing in mind this variety of terminology, we discern a split of authority as to whether tolling based on fraudulent concealment should be governed by state or federal law. *Compare Emrich v. Touche Ross & Co.*, 846 F.2d 1190, 1199 (9th Cir. 1988) ("Where a district court applies or borrows a state statute of limitations, it is also required to apply the state's equitable exceptions, to the extent these are consistent with federal law."), *and Rotella v. Pederson*, 144 F.3d 892, 897 (5th Cir. 1998) (state tolling rule of concealment applies whether or not "consistent with the federal tolling provisions"), *with Shropshear*, 275 F.3d at 598 ("[I]n a case such as this, where the federal court is applying a (borrowed) state statute of limitations, the federal doctrine of equitable estoppel [meaning fraudulent concealment], not the state doctrine, controls."), *and Farmers & Merchants National Bank v. Bryan*, 902 F.2d 1520, 1522 (10th Cir. 1990) ("When plaintiffs' causes of action accrued and whether the statute of limitations was equitably tolled [by a form of concealment] . . . remained questions of federal law."). The First Circuit has stated that "[e]ven when a federal court borrows a state's statute of

limitations, the court applies federal equitable estoppel principles," and has recognized, but not decided, the issue of whether state rules of equitable tolling apply. *See Benitez-Pons v. Commonwealth of Puerto Rico,* 136 F.3d 54, 63 (1st Cir. 1998).

In our Circuit, *Keating* appears to regard concealment as a tolling rule to which borrowed state law applies, [6] *see Keating*, 706 F.2d at 382, but the opinion is not clear on this point, and the issue was of no consequence because the federal accrual and the state tolling rules were the same, *see id.*

Whether concealment of a cause of action postpones accrual of a cause of action and is therefore a matter of federal law or whether, in New York, where it is an example of equitable estoppel, it is one of the state "tolling rules" we are to borrow in section 1983 actions (which seems the more likely alternative after *Keating*), the analysis of Pearl's claims is unaffected, because, as discussed below, his current claims are barred whether the issue is viewed as one of delayed accrual or tolling. And the outcome is unaffected no matter which of the tolling concepts is applicable. Because Pearl casts his argument in terms of "equitable tolling," by which he means fraudulent concealment of a cause of action, we will use that phrase in discussing all aspects of his contention.

In the pending case, we clearly borrow New York's rule of tolling during infancy, *see* N.Y. C.P.L.R. § 208 (McKinney 1990), and therefore the statute of limitations ran on Pearl's section 1983 claims on September 29, 1971,

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[6] *Keating* first stated the federal rule concerning concealment that postpones the accrual of a cause of action and then, "[b]orrowing" the state tolling rule, noted that the state had "adopted the same equitable estoppel doctrine." *Keating*, 706 F.2d at 382.

three years after his eighteenth birthday. Citing primarily federal case law,[7] Pearl invokes the doctrine of equitable tolling and contends that the limitations period has been tolled because the police officers who testified against him lied about the 1967 episode, giving a false version that Officer Nolan had concocted for them. Brief for Appellant at 26-36.

The tolling issue arises in this case in an unusual context. Unlike typical tolling cases in which the plaintiff contends that fraudulent concealment prevented him, even in the exercise of due diligence, from acquiring sufficient awareness of a cause of action to permit the timely filing of a lawsuit, *see, e.g., Simcuski*, 44 N.Y.2d at 448-51, 406 N.Y.S.2d at 262-64, Pearl initiated a suit against the police officers and the City of Long Beach, and that suit was settled. He now seeks to overcome the obstacle of that settlement by seeking to have the settlement vacated on the ground that it was procured by fraud, *i.e.*, the officers' false testimony, which, he contends, induced him to settle on unfavorable terms. Even if fraud against the Appellant or a fraud upon the state court warranted ignoring the prior litigation, *see Griffith v. Bank of New York*, 147 F.2d 899, 901 (2d Cir. 1945), Pearl would still have to demonstrate that the circumstances permit him to sue the officers and the City 32 years after the episode.

In considering the doctrine of equitable tolling in the context of a prior lawsuit allegedly concluded disadvantageously because of fraud, we find no pertinent New York decision. Although we have not previously encountered such circumstances, our own case law provides useful

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[7] The Appellant cites *McCabe v. Gelfand*, 57 Misc. 2d 12, 291 N.Y.S.2d 261 (N.Y. Sup. Ct. Kings Cty. 1968), which rules that a claim of concealment of a fraud presented a disputed issue of fact.

guidance. In applying the doctrine of equitable tolling, we have made an important distinction between fraudulent concealment of the existence of a cause of action and fraudulent concealment of facts that, if known, would enhance a plaintiff's ability to prevail as to a cause of action of which the plaintiff was previously aware. *See Paige v. Police Department of Schenectady*, 264 F.3d 197, 200 (2d Cir. 2001). Thus, in *Paige*, we acknowledged that a limitation period could be tolled by fraudulent concealment of a cause of action in a section 1983 police brutality suit, but ruled that the suit was time-barred because the plaintiff had enough information when she became an adult to bring her claim. *Id.* at 199-200. "Although some of the facts putatively concealed by the defendants might have strengthened [the plaintiff's] case by corroborating her story, we find that the absence of those facts did not sufficiently justify [the plaintiff] in not pursuing her cause of action as to merit equitable tolling." *Id.* at 200. If state law tolling principles apply, we have no reason to think that New York, whose tolling rules we have termed "less liberal" for plaintiffs than those of federal law, *see Saylor v. Lindsley*, 391 F.2d 965, 970 (2d Cir. 1968), would not make the same distinction we made in *Paige*.

Although we have broadly stated, as Pearl notes, that we will apply the equitable tolling doctrine "as a matter of fairness" where a plaintiff has been "prevented in some extraordinary way from exercising his rights," *Miller v. International Telephone & Telegraph Corp.*, 755 F.2d 20, 24 (2d Cir. 1985), we made it clear that we had in mind a situation where a plaintiff "could show that it would have been *impossible* for a reasonably prudent person to learn" about his or her cause of action. *Id.* (emphasis added); *see Johnson v. Nyack Hospital*, 86 F.3d 8, 12 (2d Cir. 1996).

Claims against the police officer. Thus understood, the doctrine of equitable tolling, as Pearl calls it, or equitable estoppel, as New York calls it, does not permit Pearl to sue the individual police officers at this late date. Pearl was obviously aware of his cause of action for police brutality at the time of the 1967 episode and not only could have sued the officers, but did so. Even if we assume that the alleged fraud of the officers in concocting a false account of the episode would provide a basis for setting aside the 1972 settlement of Pearl's state court civil suit, *see Griffith*, 147 F.2d at 901, a renewed assertion of his claims against the officers would be time-barred. Although the police officers' allegedly false testimony in Pearl's two criminal trials and in the depositions for his state court suit undoubtedly induced Pearl and his mother to settle that suit for a modest sum, the facts of the episode, as he now alleges them to be, were fully known to Pearl in 1967. What he has now, like the plaintiff in *Paige*, is more persuasive evidence, not newly developed awareness of a previously concealed cause of action.

Although *Bell v. City of Milwaukee*, 746 F.2d 1205 (7th Cir. 1984), where equitable tolling was permitted, *id.* at 1220-31, involves police misconduct somewhat similar to what Pearl alleges, the rationale for the Seventh Circuit's decision reveals why such tolling is not available to Pearl. In *Bell*, as is alleged here, police officers perjured themselves on the stand as to the circumstances of a shooting that caused the victim's death, and a police officer who participated in the episode came forward years later with a recantation. The central fact underlying the decision in *Bell*, however, was that, because Daniel Bell was killed by the officers, his family lacked specific, first-hand information about what had occurred. They were aware of the

death, but not of the facts that made the death actionable. Although Bell's family did not believe the reports and testimony relating to the shooting, the family had no basis for knowing or proving what actually happened because Bell did not survive to tell his version of the episode. As the Seventh Circuit later explained, "the conspiracy had prevented a full and open disclosure of facts crucial to the cause of action, rendering hollow the plaintiffs' right of access." *Vasquez v. Hernandez*, 60 F.3d 325, 329 (7th Cir. 1995). Moreover, in *Bell*, the Court of Appeals quoted extensively from the District Court's view of what it considered " 'the applicable and binding [Wisconsin] state rule of law on the application of the doctrine of estoppel by fraudulent concealment [, which considers] whether the defendants' conduct and representations were so unfair and misleading as to outbalance the public's interest in setting a limitation on an action.' " 746 F.2d at 1231 (quoting *Bell v. City of Milwaukee*, 514 F. Supp. 1363, 1371 (E.D. Wis. 1981)). Neither New York case law nor ours adopts such an expansive approach to equitable tolling.

Also superficially similar but ultimately distinguishable is *Yeadon v. New York City Transit Authority*, 719 F. Supp. 204 (S.D.N.Y. 1989), a class action brought by individuals who had been subject to false arrests by the officers of the New York City Transit Authority. An internal investigation later revealed that officers who sought to improve their arrest records routinely accused innocent, disproportionately Black and Hispanic, subway riders of petty crimes (such as pickpocketing) and initiated prosecutions against them. *Id.* at 208. The officers typically told the accused that another passenger had witnessed the offensive act and had initiated the arrest, and that the witnesses would testify at their trial. *Id.* at 209. The District Court denied the

defendant police officers' motion for summary judgment on statute of limitations grounds. *Id.* at 213. Although, as here, each plaintiff would have known that he or she had been falsely arrested, the Court based its decision on the fact that, at least for purposes of summary judgment, the record did not rule out the possibility that the fraudulent nature of the arrests was not readily apparent to the victims. Given the nature of the crime for which they were arrested—pickpocketing—it would have been highly plausible to them that the alleged "witnesses" actually existed, but had misperceived what had taken place. As the Court explained:

> Witness misperception may have seemed particularly plausible to the arrestees because the cramped conditions of New York City subways invite erroneous perception of "sexual abuse," offensive rubbing, and "jostling," movement of the hand toward a pocket or purse of another, the two crimes of which every plaintiff was accused. Because plaintiffs may not have had any information to arouse suspicion about the basis for their arrests, their causes of action would not have begun to run until they acquired that information. . . .

Id. at 210 (citing *Sandutch v. Muroski*, 684 F.2d 252, 254 (3d Cir. 1982)). Whether or not we would adopt the ruling in *Yeadon*, Pearl's claim does not depend on what other witnesses might reasonably have perceived and reported to the police.

Pearl endeavors to obtain the benefit of equitable tolling by alleging a conspiracy among the police officers to present false testimony against him and contending that, even though he knew the true facts of the 1967 episode, he did not know until receiving the Milo affidavit that he had a

cause of action against the officers for conspiracy to cover up their misconduct. In *Dory v. Ryan*, 999 F.2d 679 (2d Cir. 1993), *modified on other grounds*, 25 F.3d 81 (2d Cir. 1994), we relied on equitable tolling to permit an otherwise time-barred complaint alleging conspiracy to falsify evidence to survive a motion to dismiss. The plaintiff alleged that, several years after his conviction for selling narcotics, he obtained an affidavit from a prosecution witness who alleged that the prosecutor had prevailed upon him to testify falsely at the criminal trial. The plaintiff alleged that the prosecutor and a police officer who testified at trial "had entered into an extra-judicial conspiracy to convict [him] based on perjured testimony." *Id.* at 680. In ruling that equitable tolling was available, for the purpose of testing the sufficiency of the complaint, we observed that "as a prisoner, [the plaintiff] could not possibly have known about the alleged conspiracy until it was revealed to him." *Id.* at 681.

Dory does not aid Pearl. Although Dory knew all along what he claimed the true facts were concerning his lack of criminal culpability and must have thought at the time of trial that the police officer and the recanting witness were lying, he had no basis for knowing that their false testimony resulted from a conspiracy between the prosecutor and the police officer. By contrast, Pearl makes no allegation that the allegedly false testimony presented against him resulted from a conspiracy between, on the one hand, the testifying police officers and, on the other hand, any other official about whose involvement he was unaware. Indeed, Milo's affidavit precludes such a possibility; he avers that the plan to present false testimony originated with Officer Nolan, one of the police officers Pearl contends testified falsely.

Nor can Pearl now assert a previously concealed cause of action by pointing to a conspiracy among the four police officers who testified against him. Knowing what he contends the true facts were, he had reason to believe they were lying, and, because their versions were identical, it was a reasonable inference that the officers had agreed to present their allegedly false versions. We have previously ruled that accrual of a cause of action based on specific acts of which a plaintiff was aware cannot be postponed, nor can a limitations period be tolled, simply by alleging that the acts were taken pursuant to a conspiracy. *See Pinaud*, 52 F.3d at 1156-58; *Singleton*, 632 F.2d at 192-93.

Pearl cannot validly claim concealment of his causes of action against the police officers, whether based on section 1983, RICO, or state law.

Claims against the City of Long Beach. Pearl's awareness of his causes of action against the police officers also precludes application of equitable tolling (or equitable estoppel) to most of his claims against the City of Long Beach. Aware of the injuries that the officers inflicted upon him, he was similarly aware of his currently alleged state law causes of action against the City based on *respondeat superior* and alleged negligent training and supervision of the officers. Complaint, Claims 10, 11. The one cause of action now alleged of which Pearl was not aware until he received the second Milo affidavit is what he labels his "*Monell* Claim": that his injuries resulted from a municipal policy of failing to "control police officers engaged in the excessive and unjustified use of force" and maintaining a "police code of silence wherein police officers regularly coverup police use of excessive and unjus-tified force by telling false and incomplete stories . . . in sworn testimony. . . ." Complaint, Claim 4. In that affidavit Milo stated that

there existed in the Long Beach Police Department "a pattern of brutality in which not all police officers participated but in which all acquiesced." Although not explicitly alleging a policy of encouraging false testimony, Milo's statement that "you learned quickly to look the other way and not to open your mouth" adequately supports the allegation of the Complaint that the City's policy included providing false testimony.

At the outset of our consideration of tolling with respect to this claim of a municipal policy, we note that the "municipal policy" cause of action that Pearl alleges was not recognized until 1978 when the Supreme Court decided *Monell*. The Court there slightly modified the insulation of municipalities from suits under section 1983, *see Monroe v. Pape*, 365 U.S. 167, 187-92 (1961), by ruling that a municipality could be held liable for constitutional torts committed pursuant to a municipal custom or policy. *Monell*, 436 U.S. at 694; *see City of Canton v. Harris*, 489 U.S. 378, 389 (1989); *Oklahoma City v. Tuttle*, 471 U.S. 808, 823-24 (1985) (plurality opinion). We have rejected the claim that a *Monell* claim did not accrue until the date of the *Monell* decision. *Fiesel v. Board of Education*, 675 F.2d 522, 524 (2d Cir. 1982). But Pearl is not seeking delayed accrual until the date of *Monell*; his equitable tolling argument based on fraudulent concealment of his *Monell* claim seeks either accrual of that claim until discovery of Milo's affidavits or tolling of that claim, if it is viewed as accruing earlier.

It is a fair question whether a cause of action can be said to be concealed for purposes of equitable tolling when it did not exist at the time the plaintiff's injuries were inflicted or when the limitation period for redressing those

injuries expired. We acknowledge, however, that there is some force to Pearl's contention that, notwithstanding the date when *Monell* was decided, he should benefit from equitable tolling if he can demonstrate that the defendants prevented him from advancing the claim that was ultimately upheld in *Monell*. But for the defendants' concealment, he contends, he could have been the first to establish the *Monell* rule.

As with so much of Pearl's argument, the surface attractiveness of his position disappears upon closer examination of the case law that has developed concerning the doctrine of equitable tolling or estoppel to plead a limitations defense. New York has made it clear that, in the absence of a fiduciary relationship between the wrongdoer and the victim, an estoppel barring a limitations defense will not arise unless there has been "active fraudulent concealment" by the wrongdoer. *Riley v. State*, 105 A.D.2d 1104, 1105, 482 N.Y.S.2d 626, 628 (4th Dep't 1984); *see Gleason v. Spota*, 194 A.D.2d 764, 765, 599 N.Y.S.2d 297, 299 (2d Dep't 1993). Federal courts impose a similar requirement. *See Davis v. Grusemeyer*, 996 F.2d 617, 624 n.13 (3d Cir. 1993) (fraudulent concealment claim inadequately pled because plaintiff "failed to allege active concealment" by any defendant); *Welch v. Cadre Capital*, 923 F.2d 989, 993 (2d Cir. 1991); *Baskin v. Hawley*, 807 F.2d 1120, 1130-31 (2d Cir. 1986).

Pearl has made no showing that the City of Long Beach actively concealed from him the existence of a municipal policy concerning either police brutality or false testimony concerning such misconduct. If he aspired to anticipate *Monell*, due diligence required him at least to use the generous provisions of federal discovery rules to obtain information concerning other episodes similar to his that might

have sufficed to support a claim of a municipal policy.[8] In the absence of such inquiry, he cannot point to any misrepresentation by City officials that amounts to "active fraudulent concealment" of what might have become a pioneering *Monell* cause of action. Pearl's allegations of false testimony by the police officers bear at most on thwarting successful pursuit of his claims concerning the episode in which he was involved; the officers were not asked about and did not misrepresent with respect to municipal policy or custom.

Conclusion

In the face of the unusual circumstance of a former police officer coming forward to recant his own prior testimony and to admit that he and other officers lied in an attempt to convict David Pearl and to deny him a fair civil recovery for his serious injuries, we take no pleasure in ruling that the statute of limitations remains an insuperable obstacle to his effort to obtain adequate compensation for the brutality inflicted upon him 35 years ago. But we are obliged to uphold the policies animating the applicable statute of limitations, *see Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 463-64 (1975), and to apply faithfully the limited exceptions to those policies recog-

[8] In *Yeadon*, where the District Court permitting tolling of a limitations period because of concealment of a *Monell* claim, the Court found that the defendants "dodged discovery requests that would have disclosed the false arrest scheme," and "repeatedly represented to plaintiffs that complaining witnesses had initiated the arrests, and that the witnesses would appear in court to prosecute," which the Court determined "kept [the plaintiffs] from discovering the pattern of which those arrests were a part." *Yeadon*, 719 F. Supp. at 208-10.

nized by applicable law, whether federal law of accrual or state law of tolling. The result seems harsh, given the apparent persuasiveness of Milo's recantation, yet we know of no basis in federal or New York law to make an exception to accommodate Pearl's claims, just because he now appears to have much stronger evidence than he had in 1967. There are undoubtedly other plaintiffs who lost at trial or settled for modest amounts in the face of evidence they now believe they can successfully impeach. It is unlikely that many of these plaintiffs now have a recanting police officer on their side. More likely, their basis for impeachment of their adverse outcomes is far less substantial. To reopen all such claims might compensate a few deserving plaintiffs, but it would also put at risk many blameless defendants who could not fairly defend after expiration of the interval the state legislature has determined is appropriate.

The absence of an available judicial remedy, however, does not necessarily mean that David Pearl has no recourse. Courts are not the only forum for redress of grievances. Our ruling today does not prevent the City of Long Beach from making such inquiry as it deems appropriate into the circumstances that led to Pearl's loss of sight in one eye, and to provide whatever compensation it concludes is warranted.

The judgment of the District Court is affirmed.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

ROSEANN B. MACKECHNIE
CLERK

Date: July 15, 2002
Re: Pearl v. City of Long Beach
Docket No(s).: 01-7914

Dear Counsel:

The court has issued its opinion in the above-entitled case, and the decision of the district court has been

AFFIRMED

Judgment was entered on 7/15/02, and a mandate will later issue in accordance with Rule 41 of the Federal Rules of Appellate Procedure.

A copy of the opinion in manuscript form [is enclosed herewith,] and you will receive a mailed copy of the printed slip opinion in due course. Additional copies of the slip opinion are available from this office in accordance with Local Rule 0.17(8).

If you are required by Rule 39(c) of the Federal Rules of Appellate Procedure to file an itemized and verified bill of cost, you are reminded to do so, with proof of service, within 14 days after entry of judgment.

Very truly yours,

ROSEANN B. MACKECHNIE, Clerk

By: /s/ ANGELA MARTIN
Angela Martin
Deputy Clerk, USCA

opncvltr_frm

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 01-7914

Filed July 15, 2002

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 15th day of July, two thousand and two.

Before:

HON. JOHN M. WALKER, JR., *Chief Judge*
HON. JON O. NEWMAN,
HON. AMALAYA L.KEARSE,

Circuit Judges.

DAVID PEARL,

Plaintiff-Appellant,

v.

THE CITY OF LONG BEACH, LONG BEACH CITY POLICE DEPARTMENT, LONG BEACH POLICE OFFICER LEO NOLAN, ARTHUR WHITMAN and LONG BEACH POLICE OFFICER VINCENT MILO,

Defendants-Appellees.

MANDATE

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York and was argued by counsel.

On consideration whereof, it is hereby ORDERED, ADJUDGED and DECREED that the judgment of said district court be and it hereby is AFFIRMED in accordance with the opinion of this Court.

FOR THE COURT:
ROSEANN B. MACKECHNIE, Clerk
by

/s/ ARTHUR M. HELLER
Arthur M. Heller
Administrative Attorney

[STAMP]

A TRUE COPY
ROSEANN B. MACKECHNIE, CLERK

by /s/ ANGELA MARTIN
DEPUTY CLERK

[STAMP]
ISSUED AS MANDATE: OCT 16 2002

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

ROSEANN B. MACKECHNIE
CLERK

Docket No. 01-7914

Filed Oct. 9, 2002

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 9th day of October, two thousand two.

DAVID PEARL,

Plaintiff-Appellant,

v.

THE CITY OF LONG BEACH, LONG BEACH CITY POLICE DEPARTMENT, LONG BEACH POLICE OFFICER LEO NOLAN, ARTHUR WHITMAN and LONG BEACH POLICE OFFICER VINCENT MILO,

Defendants-Appellees.

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellant David Pearl.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT
ROSEANN B. MACKECHNIE, Clerk

By: /s/ ARTHUR M. HELLER
Arthur M. Heller
Administrative Attorney

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